

# BIOMASS PROCUREMENT AGREEMENT

## (Aggregator Selling to End User)<sup>1</sup>

This Biomass Procurement Agreement (the “Agreement”) is entered into as of the \_\_\_ day of \_\_\_\_\_, 20\_\_, between \_\_\_\_\_ (“Purchaser”) and \_\_\_\_\_ (“Aggregator”). Purchaser and Aggregator are hereafter sometimes collectively referred to as the “Parties” and individually as a “Party”.

### RECITALS

- A. Purchaser desires to procure a consistent supply of processed biomass of reliable quantity, size, and quality [**as fuel for heat or power generation**] [**as feedstock for bio-based products or advanced biofuels**] [**Alternatively, insert Purchaser’s other specific purpose**]<sup>2</sup> (the “Biomass”).
- B. Aggregator is an aggregator and processor of such Biomass.
- C. Purchaser wishes to purchase Biomass from Aggregator and Aggregator wishes to sell Biomass to Purchaser.
- D. Purchaser and Aggregator are willing to enter into this Biomass Procurement Agreement on the terms and conditions set forth below, under which Aggregator will provide and Purchaser will pay for the Biomass and, if applicable, related services, as described on Exhibit A to this Agreement.

### AGREEMENT

NOW, THEREFORE, for good and valuable consideration, the receipt of which is hereby acknowledged, Aggregator and Purchaser agree as follows:

- I: DEFINITIONS.** Unless expressly defined elsewhere in this Agreement, capitalized terms used in this Agreement shall have the meaning set forth in Exhibit C attached to this Agreement.
- II. GENERAL CONDITIONS.** In addition to the Special Conditions below, the Parties’ relationship under this Agreement is governed by the general terms and conditions set forth in Exhibit D attached to this Agreement.

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<sup>1</sup> This Agreement is designed for use between an Aggregator (e.g., Agricultural Products Cooperative, Sawmill or other aggregator receiving biomass deliveries from biomass producers) to an End User (Power Plant, Cellulosic Ethanol Plant, Industrial User or other biomass conversion facility). It contemplates the Aggregator providing value-added processing to the Biomass such as densification, pelletizing or chipping that processes raw biomass to address concerns about size, density or content. A separate “Biomass Production Agreement” addresses the issues that arise in the relationship between a Producer (such as a grower or a logger) and an Aggregator or a Producer selling directly to an End User.

<sup>2</sup> The bolded, bracketed provisions throughout the Agreement indicate areas for which the Parties need to insert specific language that addresses their actual circumstances.

### III: SPECIAL CONDITIONS

#### 1. Process & Objectives

- a. Process<sup>3</sup>. Purchaser is procuring the Biomass for use in the following process [**Insert description of Purchaser's industrial use, power generation or other biomass conversion process**] ("Purchaser's Process"). Aggregator will use commercially reasonable efforts to supply the Biomass and, if applicable, provide the related services in a manner that supports Purchaser's Process.
- b. Objectives.<sup>4</sup> Aggregator and Purchaser have entered into this Agreement to accomplish the following objectives and further their respective interests: [**Insert as Applicable**]. The Parties acknowledge that the above described interests of Purchaser and Aggregator are material provisions of this Agreement.

#### 2. Nature and Source of Biomass. The Biomass delivered by Aggregator shall be derived from one or more of the renewable biomass raw materials described on Exhibit A.

#### 3. Quantity Offered for Sale<sup>5</sup>. Aggregator shall deliver on or before the "Delivery Time" as defined below to Purchaser at the Delivery Location not less than [**Insert Units (Tons, railcar or truckload volume, MMBTUs, etc.)**] of Biomass that conforms to the Specifications set forth in Exhibit A to this Agreement (the "Minimum Quantity"). Aggregator shall have the right to deliver up to a total of [**Insert Units**] (the "Maximum Quantity") at each Delivery Time`. So long as the delivered Biomass conforms to the Specifications, Purchaser shall be required to accept and pay for the Biomass up to the Maximum Quantity. Purchaser may order amounts in addition to the Maximum Quantity by requesting additional deliveries from Aggregator, specifying the quantity required and the date and time by when Purchaser requires the delivery. Aggregator shall promptly notify Purchaser whether it is able to satisfy this request<sup>6</sup>.

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<sup>3</sup> In many biomass supply relationships, the parties have found it helpful to specify not only the type of process, but the specific equipment that will be using the Biomass, so that they can collaborate on issues such as preserving the function of the equipment and achieving emissions controls that are critical to the operation and use of the equipment.

<sup>4</sup>The Parties have the option to use the "Objectives" provision to state their objectives (renewable energy production, environmental objectives, development of biomass market, etc.) and to describe their general approach to the relationship (reasonable risk allocation and benefit sharing, etc.). It is an opportunity to set the tone for the contractual relationship and establish parameters that will inform the interpretation and application of the provisions that follow. If this provision is used in a multiple Biomass use scenario (e.g., power generation plus production of liquid fuel), the Parties should be careful to ensure that they capture the potential considerations relevant to all intended uses.

<sup>5</sup> This Section offers one possible delivery arrangement. Aggregator is obligated to deliver a minimum quantity with a limited right to over-deliver, with Purchaser required to accept the over-delivery within the over-delivery band. The Parties should give careful thought to whether they will permit short term delivery shortfalls/over-delivery, so long as the totals delivered over an agreed to period (e.g. annually) meet the wishes of both Parties.

<sup>6</sup> This Section is written as if Aggregator will honor the request for additional deliveries unless it is not able to and assumes that the Biomass Unit Price for any additional deliveries will be the same as for the Minimum/Maximum

4. Specifications; Testing. The Biomass shall conform to the specifications established by Purchaser and listed on Exhibit A (the “Specifications”). The Biomass shall be tested for conformity to the Specifications as set forth on Exhibit A. All testing conducted by Purchaser at the Delivery Location shall be at the sole cost of Purchaser. Any Third Party Testing shall be conducted with the frequency and the cost allocated as set forth on Exhibit A. Aggregator shall have the option to collect duplicate samples of the material tested by Purchaser and have such samples tested, at Aggregator’s expense.
5. Delivery Location. Aggregator shall deliver the Biomass to Purchaser by **[Insert mode of transportation – truckload, railcar, etc.]** at the following location (the “Delivery Location”):\_\_\_\_\_. The Biomass shall be delivered to Purchaser F.O.B. at the Delivery Location, with Aggregator bearing the risk of loss and responsibility for insurance until Aggregator or its selected carrier shall deliver the Biomass to Purchaser at Delivery Location. Aggregator shall be responsible for storing the Biomass until delivery to Purchaser and for transporting the Biomass to the Delivery Location.
6. Time for Delivery. Aggregator shall deliver the Biomass to Purchaser at the following dates and times: **[Insert delivery frequency or specific dates and times]** (the “Delivery Time”).
7. Compensation. As compensation for the Biomass and any related services, Purchaser shall pay Aggregator **[\$\_\_\_ per \_\_\_\_\_Insert applicable unit measure]** (the ‘Biomass Unit Price’) **[Alternatively, “as set forth on Exhibit B to this Agreement”]**<sup>7</sup>. The Biomass Unit Price shall be adjusted annually as follows: [Insert CPI or other index for annual adjustment].<sup>8</sup> If applicable, Purchaser shall pay Aggregator for any additional services as set forth on Exhibit B.
8. Contingencies<sup>9</sup>. The Parties’ duty to perform their respective obligations under this Agreement is contingent upon the satisfaction of the following conditions:
9. Term. This Agreement is for a period of \_\_\_\_\_ **[Insert Period of Month or Years]** (the “Term”) and will commence upon execution of this Agreement and terminate on \_\_\_\_\_ **[Insert Termination Date]** unless sooner terminated in accordance

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Quantity. If the Parties wish to have a different price apply or give Aggregator wider discretion to decline to supply additional delivery requests, this should be written into the Agreement.

<sup>7</sup> If the Parties use a fixed price, combined with an index or escalation clause, Section 7 can be used to capture the base price and annual adjustments. If the Parties wish to use a more sophisticated pricing mechanism, such as a matrix formula, indexing to multiple variables or gain-sharing components, then it is appropriate to use Exhibit B to capture these detailed terms. Similarly, if Purchaser will be paying any amount to compensate Aggregator or its participating producers for crop establishment costs, this should be addressed in a separate provision.

<sup>8</sup> If a more sophisticated adjustment scheme is agreed to, such as pass-through of specific component cost increases like diesel fuel, etc., the Parties should use Exhibit B to capture the details.

<sup>9</sup> This Section can be deleted if not applicable. If applicable, use this Section to insert circumstances that must be present for the Agreement to be implemented (e.g. Completion of power plant or other facility that will consume the Biomass, the Project qualifying for funding under a government assistance program, or environmental and conservation restrictions.).

with the terms of this Agreement.

10. Commencement. Aggregator will commence performance of its obligations under this Agreement (Select one of the following): [**upon execution of this Agreement**] [on \_\_\_\_\_, 20\_\_.] (the “Commencement Date”).
11. Right to Reject Non-Conforming Biomass Delivery<sup>10</sup>. If any delivery of Biomass or portion thereof (e.g., a container within a multi-container delivery) is “Non-Conforming to Specifications, as set forth in Exhibit A, Purchaser shall have the right to reject the Non-Conforming Biomass delivery or Non-Conforming portion thereof.
12. Representations re Growing & Harvesting Practices. Aggregator represents that it has required all producers of biomass that it utilizes to create the Biomass to comply with the following practices in growing and harvesting the Biomass:
  - a. If the Biomass consists of forest products, then Aggregator shall comply with Wisconsin’s Forestland Woody Biomass Harvesting Guidelines (December 16, 2008). If a forest management plan is required, then aggregator shall, at its sole expense, prepare such plan or provide evidence to Purchaser that such plan has been prepared and approved.
  - b. If the Biomass consists of agricultural products, then Aggregator shall comply with the Planting and Harvest Guidelines for Non-forest Biomass on Public and Private Land developed by DATCP, DNR and the UW College of Agricultural and Life Sciences.<sup>11</sup>

Aggregator shall indemnify and hold Purchaser harmless against any losses to third parties or claims by third parties against Purchaser to the extent such losses or claims arise out of Aggregator’s breach of the foregoing representations.

13. Notices. Any notices, demands, or other communications required or desired to be given by any party shall be in writing and personally served, or deposited in the United States mail, certified or registered, postage prepaid, return receipt requested. If served personally, notice shall be deemed given at the time of such personal service. If given by mail, such notice shall be conclusively deemed given three days after deposit thereof in the United States mail addressed to the party to whom such notice, demand or other communication is to be given as follows:

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<sup>10</sup> In appropriate circumstances the Parties may choose to include other remedies for Non-Conforming Biomass deliveries. Other potential remedies for failure to provide conforming deliveries of Biomass include: (a) Purchaser’s right to cover at Aggregator’s expense; (b) Purchaser’s right to suspend acceptance of deliveries until the quality problems are resolved; and (c) Purchaser’s right to terminate the Agreement if more than a specified percentage of Biomass deliveries are Non-Conforming.

<sup>11</sup> The Parties may also wish to reference sustainability and other requirements required as part of BCAP or other incentive programs and consider attaching copies of the applicable guidelines. In appropriate transactions, it may also make sense to provide for a mechanism by which a third party certifies compliance with the specified practices. Should the Parties employ third party certification, it is important that their negotiations address allocation of the cost of such third party certification.

If to the Aggregator: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If to the Purchaser: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Any party hereto may change its address for purposes of this paragraph by written notice given in the manner provided above.

IN WITNESS WHEREOF the undersigned have executed this Agreement as of the day and year first written above.

**PURCHASER**

[Insert Purchaser Name}

By: \_\_\_\_\_

Its: \_\_\_\_\_

**AGGREGATOR**

[Insert Aggregator Name]

By: \_\_\_\_\_

Its: \_\_\_\_\_

**EXHIBITS & SCHEDULES**

Exhibit A: Scope of Work/Specifications  
Exhibit B: Compensation  
Exhibit C: Definitions  
Exhibit D: General Terms & Conditions

**Exhibit A**  
**Scope of Work/Specifications**

1. **Nature & Sources of Biomass:** The Biomass will be derived from the following sources:  
\_\_\_\_\_ **[Specify types of biomass raw material that are permitted in Biomass and source location(s).]**
2. **Biomass Processing.** Aggregator shall provide the following processing to the Biomass before delivery to Purchaser at the Delivery Location: **[Insert description of pelletizing, densification etc.]**
3. **Delivery Location Testing Specification:** Each Delivery of Biomass shall be tested for the following specifications at the Delivery Location in accordance with the protocols listed below:
  - a. **Weight (in Pounds):** Purchaser shall weigh each delivery of Biomass at the Delivery Location.
  - b. **Moisture.** Moisture content shall be measured as a percentage of the weight of the Biomass and shall not exceed \_\_\_\_% by weight. Moisture content shall be measured by Purchaser at the Delivery Location by **[Insert methodology.]**
  - c. **Free of Foreign Matter Contamination:** Purchaser shall visually inspect each delivery of Biomass at the Delivery Location to confirm that it is free of non-trivial amounts of foreign material, including, but not limited to trash, soil, stones, plastics, dirt, metal and other inorganic content. Notwithstanding whether a delivery passes visual inspection, in no event shall any delivery exceed \_\_\_\_% of such content.
  - d. **Biomass Particle Size**<sup>12</sup>: \_\_\_\_\_.
  - e. **BTU Content:** The Biomass shall have an average BTU content of \_\_\_\_\_ MMBTU/Ton, measured over [insert time period and weight of measured Biomass sampled.]. BTU content of the Biomass shall be measured by Purchaser as follows: **[Insert where and how.]**
  - f. **Ash Content:** The ash content of the Biomass shall not exceed \_\_\_\_\_% by weight.
  - g. **Alkalinity Corrosion:** [Insert applicable Specifications].
  - h. **Other Criteria (Please Attach)**<sup>13</sup>.

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<sup>12</sup> If applicable the Parties should agree upon and specify the methodology for measuring particle size (e.g. For example, horizontal and rotary screening devices for wood chips, etc.).

<sup>13</sup> At least one biomass cooperative has indicated that managing mineral content is critical, as silica and other substances can corrode equipment. Also consider whether it is practical to complete the tests in 3.e. through g at the Delivery Location.

4. **Specifications for Laboratory Testing.** [Need to specify how often testing occurs, who does the testing and, if testing is performed by a third party, how the cost of testing is allocated.]
5. **Non-Conforming Biomass Delivery<sup>14</sup>.** A Biomass delivery shall be considered “Non-Conforming” for purposes of this Agreement if any of the following circumstances apply: [Insert degree of deviation from Specifications that trigger right to reject].
6. **Other Services.** [If applicable, list below any other services, e.g. transportation or storage, that are being provided by Aggregator and compensated for separately from the deliveries of the Biomass itself.]
7. **Changes to Scope of Work.** All changes to the scope of work under this Agreement shall be confirmed in writing by a change order or other writing signed by Purchaser and Aggregator.

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<sup>14</sup> The Parties need to consider when a deviation from the Specifications (e.g. BTU content lower than required) results in a price adjustment versus when a deviation is such that it renders the Biomass delivery useless for the Purchaser’s purposes.

## **Exhibit B**

### **Compensation<sup>15</sup>**

Purchaser shall compensate Aggregator for the Biomass and any related services provided under this Agreement as follows:

1. **Indexed Compensation for Biomass** . Purchaser shall compensate Aggregator for Biomass based the indexes and formulas that are set forth on Exhibit B, Schedule 1, as adjusted by the items below.
2. **Compensation for Additional Services**. If not included in the cost of the Biomass under Section 1 above, Purchaser shall further compensate Aggregator for the services describe below as follows:.

- a. **Transportation & Delivery Services<sup>16</sup>**. List any additional charge for transportation and how it is determined (by distance from receiving point to point of Biomass origin, etc.).\_\_\_\_\_.

- b. **Storage Services**. [List any additional charge.]

**Crop Establishment Assistance**. \_\_\_ Yes \_\_\_ No. (If Purchaser is paying Aggregator amounts for crop establishment<sup>17</sup>, attach Crop Establishment Assistance Schedule setting for amount and terms of assistance)<sup>18</sup>.

3. **Environmental Attributes**. Any carbon credits, greenhouse gas offsets, green tags, renewable energy credits, production tax credits for renewable energy, allowances for air emissions or any other environmental attributes associated with the Biomass and its use by Purchaser shall, and any credits, grants or incentive payments derived therefrom (“Environmental Attributes”) shall, as between Purchaser and Aggregator:

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<sup>15</sup> If the Parties have agreed that Purchaser will pay for the Biomass based on a fixed price basis with limited adjustments, then they will be able to do without this Exhibit B.

<sup>16</sup> The basis for compensation for transportation is critical and affects other aspects of performance. For example, if payment is based on units of Biomass measured by weight x distance transported, then moisture content is critical, as it would increase the transport cost, but reduce the combustion value of the Biomass.

<sup>17</sup> This type of assistance might be paid when contracting with a new biomass cooperative.

<sup>18</sup> Crop establishment assistance provisions can raise complex issues, including the issue of whether to what extent such assistance should be reduced by crop establishment incentive programs, such as BCAP’s payment of up to 75% of the costs of establishing an energy crop. At present, the BCAP rules are undergoing revision and if the parties agree to include the effect of BCAP, such as a dollar for dollar reduction in assistance for program payments, they should take into account the possibility that such payments may increase, decrease, be interrupted or disappear.

An alternative to bargaining for a specific amount or type of crop establishment assistance is to have the Purchaser agree to provide good faith support to any initiatives pursued by Aggregator (or its Producers) to obtain crop establishment assistance.



- a. Belong to Purchaser: \_\_\_\_\_
  - b. Belong to Aggregator: \_\_\_\_\_
  - c. Be Allocated as Follows: \_\_\_\_\_
- \_\_\_\_\_.

4. **Sales & Use Tax.** Unless Purchaser and Aggregator have expressly agreed otherwise, Aggregator's quote for the services described above does not include sales, use, excise or similar taxes or duties. Purchaser shall pay these taxes directly if the law allows or will reimburse Aggregator, if Aggregator is required to pay them.
5. **Adjustments<sup>19</sup>.** If applicable, the Compensation paid for the Biomass shall be adjusted under the following circumstances: **[Insert description of any upward or downward adjustments to the Biomass price].**
6. **Escalators for Increased Input Costs.** The Compensation shall be adjusted as provided below for Aggregator's increased costs relating to the following:
  - diesel fuel
  - insurance
  - property taxes
  - seed
  - custom work
  - storage

**[If included, need to include specific cost adjustment mechanism, including how and when these will be reviewed and the adjustment interval (e.g., monthly, annually).]**

7. **Take or Pay<sup>20</sup>.** Biomass deliveries \_\_\_\_ will \_\_\_\_ will not be made on a take or pay basis.
8. **Past Due Payment.** Any amounts not paid on or before their due date shall bear interest at the rate of \_\_\_\_ percent per annum until paid in full.

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<sup>19</sup> Possible adjustments may include:

- Premiums for Biomass that exceeds the BTU specification
- Downward adjustments for Biomass that falls short of the BTU or other specifications.
- Annual CPI Adjustments
- Guaranteed Best Local Price Adjustments (e.g. If Purchaser is paying another Aggregator in the same geographic region a higher price for the same Biomass.)

<sup>20</sup> Consider whether Purchaser is excused under any circumstances (e.g. Unscheduled equipment outage, default by its customers) from taking the amount of Biomass offered for delivery, so long as it is within the Agreement Minimum and Maximum Amounts. By analogy, coal delivery contracts are often made on a "take or pay" basis, putting the responsibility upon users to plan for room to store the delivered coal.

If the Parties agree that deliveries will be on a take or pay basis, then additional details relating to this issue, such as reasonable advance notice of any excusing circumstances, should be addressed as part of this provision.

## **Exhibit B, Schedule 1**

### **Indexed Basis for Biomass Compensation<sup>21</sup>**

[Note: A very bare bones example of such an Indexed Basis formula for Compensation is outlined below:<sup>22]</sup>

**Indexed Compensation Formula:** The price Purchaser pays for the Biomass shall be determined by the following formula.

1. Avoided Cost Base Price (Determined by reference to existing fuel or other feedstock price, Transportation Costs, if separately billed, SO<sub>2</sub> and NO<sub>x</sub> emissions trading allowance costs, etc), plus
2. Environmental Attributes Value Cost Sharing (As set forth on Exhibit B, Item 3), plus/minus
3. Quality Price Adjustments (As set forth on Exhibit B, Item 5).

**Minimum Biomass Price<sup>23</sup>.** Notwithstanding the results obtained from the Indexed Compensation Formula set forth above, in no event shall the Biomass Unit Price be less than: [Insert minimum Biomass Unit Price].

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<sup>21</sup> An indexed basis approach to compensation is appropriate when the Parties wish to tie compensation to costs of benchmarks or commodities on either side of the transaction. Purchasers may want to use alternate fuel supplies as an index to capture the value of the Biomass relative to alternate fuel choices. A hybrid approach can also be utilized, with a fixed base price component, plus a component indexed to the Purchaser's avoided cost or the Aggregator's cost of key input such as fossil fuel.

<sup>22</sup> A much more detailed and complex example of such an approach can be found in the Energy Crop Biomass Fuel Supply Agreement between Environmental Fuels Cooperative and City of Lakeland Florid, Department of Electric and Water Utilities. See [www.retscreen.net/fichier.php/1590/fuelcontract.doc](http://www.retscreen.net/fichier.php/1590/fuelcontract.doc)

<sup>23</sup> A minimum biomass price may be appropriate if the Parties wish to protect the reliability of the Biomass supply, by supporting the economic viability of Aggregator.

## **Exhibit C**

### **DEFINITIONS**

“Agreement” shall mean this Biomass Procurement Agreement.

“Aggregator” shall have the meaning set forth in the preamble to this Agreement.

“Avoided Cost Base Price” means: [Insert reference to applicable Index(es) and how they are tied to the Unit Price for Biomass.

“Biomass” shall have the meaning set forth in the Recitals to this Agreement.

“Biomass Unit Price” shall have the meaning set forth in Article III, Section 8 of this Agreement.

“BTU (British Thermal Unit)” means the quantity of heat required to raise the temperature of one pound of water by one degree Fahrenheit.

“Commencement Date” shall have the meaning set forth in Article III, Section 11 of this Agreement.

“DATCP” means the Wisconsin Department of Agriculture Trade and Consumer Protection.

“Delivery Time” shall have the meaning set forth in Article III, Section 6 of this Agreement.

“Delivery Location” shall mean the place where control of Biomass is delivered to Purchaser as set forth in Article III, Section 5 of this Agreement.

“DNR” means the Wisconsin Department of Natural Resources.

“Environmental Attributes” shall have the meaning set forth in Exhibit B.

“F.O.B” means “Free on Board” or the point where risk of loss of the Biomass Fuel/Feedstock passes from Aggregator to Purchaser.

“Material Deviation” means

“Maximum Quantity” has the meaning set forth in Article III, Section 3 of this Agreement.

“Minimum Quantity” has the meaning set forth in Article III, Section 3 of this Agreement.

“MMBTU” means one million BTUs.

“Non-Conforming” has the meaning set forth in Exhibit A to this Agreement.

“Party” or “Parties” shall have the meaning set forth in the preamble to this Agreement.

“Purchaser” shall have the meaning in the preamble to this Agreement.

“Purchaser’s Process” shall have the meaning set forth in Article III, Section 1 of this Agreement.

“Specifications” has the meaning set forth in Exhibit A of this Agreement.

“Term” shall have the meaning set forth in Article III, Section 10 of this Agreement.

**Exhibit D**  
**GENERAL CONDITIONS**

1. Cooperation. Purchaser and Aggregator agree to cooperate fully with each other in the provision of the Services, including, without limitation, timely payment, timely access to the Delivery Location, and timely provision of requested information, including advance notice of material changes in circumstances that may frustrate performance of either Party's obligations under this Agreement.
2. Independent Contractor. Purchaser and Aggregator agree that Purchaser is engaging Aggregator as an independent contractor and Aggregator shall determine the means and the methods of delivering the Biomass and performing the related services. Aggregator shall not be considered the agent, servant or employee of Purchaser at any time or under any circumstances or for any purpose whatsoever.
3. Aggregator's Representations. Aggregator hereby represents and warrants to Purchaser that:
  - a. Aggregator is a **[insert type of entity]** duly formed, validly existing and in good standing under the laws of the State of \_\_\_\_\_ and is fully qualified to do business in the State of Wisconsin and in such other jurisdictions in which its business and activities require qualification.
  - b. The execution and delivery of this Agreement has been duly authorized by all necessary entity action and this Agreement constitutes the legal, valid and binding obligation of Aggregator, enforceable against Aggregator in accordance with its terms.
  - c. Aggregator has received the approval of any public regulatory body having jurisdiction necessary for Aggregator to perform its obligations under this Agreement.
  - d. The execution and delivery of this Agreement and performance of Aggregator's obligations hereunder do not require the consent of any third party, nor will they result in a breach or default of any other Agreement to which Aggregator is a party or by which Aggregator is bound.
  - e. The Biomass to be supplied to Purchaser under this Agreement shall be delivered to the Delivery Location free and clear of any liens or encumbrances of any type.
4. Purchaser's Representations. Purchaser hereby represents and warrants to Aggregator that:
  - a. Purchaser is a **[insert type of entity]** duly formed, validly existing and in good standing under the laws of the State of \_\_\_\_\_ and is fully qualified to do business in the State of Wisconsin and in such other jurisdictions in which its business and activities require qualification.
  - b. The execution and delivery of this Agreement has been duly authorized by all necessary entity action and this Agreement constitutes the legal, valid and binding

obligation of Purchaser, enforceable against Purchaser in accordance with its terms.

- c. Purchaser has received the approval of any public regulatory body having jurisdiction necessary for Purchaser to perform its obligations under this Agreement.
  - d. The execution and delivery of this Agreement and performance of Purchaser's obligations hereunder do not require the consent of any third party, nor will they result in a breach or default of any other Agreement to which Purchaser is a party or by which Purchaser is bound.
5. No Subcontracting or Assignment. Except as expressly set forth in this Agreement, Aggregator may not assign this Agreement or Aggregator's obligation to provide the Biomass and related services without the prior written approval of Purchaser, which shall not be unreasonably withheld. It shall not be unreasonable for Purchaser to withhold its consent to any such assignment that would affect the nature, quality or delivery schedule for the Biomass.
6. Performance Excuse<sup>24</sup>. Either Party shall be excused from performance of its obligations under this Agreement to the extent that its performance is prevented or materially impeded by the following circumstances beyond the reasonable control of such Party : **[Insert applicable circumstances]**
7. Audit & Inspection. Purchaser, upon reasonable notice to Aggregator at any time during regular business hours, shall have the right to audit and inspect Aggregator's books and records with respect to the methods by which (a) the source material for the Biomass is obtained; and (b) the Biomass is sampled, analyzed, loaded and transported under this Agreement.
8. Indemnity<sup>25</sup>. **[Insert as Applicable]**.
9. Limitation of Liability<sup>26</sup>. In no event shall a party be liable for any indirect, consequential, incidental, lost profits or like expectancy damages arising out of this Agreement.

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<sup>24</sup> This Section offers the Parties an opportunity to address circumstances that excuse performance, such as Force Majeure and weather risk. Such provisions are appropriately negotiated in a Biomass procurement agreement, where there are many variables that are partially or entirely beyond one or other Party's control.

<sup>25</sup> The Parties should consider whether either Party should be indemnified against certain types of damages and the extent to which the risk and potential cost of the indemnity is covered by the Compensation. For example, is an indemnity appropriate if non-conforming Biomass damages Purchaser's equipment or if Purchaser's failure to take delivery of Biomass results in harm to Producer. What premium, if any, should be added to the Compensation to reflect the risk associated with having to provide indemnification? The model Agreement does not include a standard indemnity provision because the content of indemnity clauses depend upon a number of circumstances including, among other things, the relative bargaining power of the Parties and their status (e.g., The State of Wisconsin is constitutionally prohibited from indemnifying others).

<sup>26</sup> This provision is a starting point for discussions. If there are specific situations in which one Party has the ability to expose the other to liability to third parties over something over which the other Party has no control, it may be appropriate to carve out such situations from the general limitation of liability.

10. Defaults. The following shall be defaults under this Agreement:

- a. Purchaser's failure to make any payment within ten (10) days of its due date.
- b. Aggregator's failure to provide the Services in accordance with the Scope of Services, which failure continues uncured for thirty (30) days after written notice from Purchaser.

11. Remedies<sup>27</sup>. In the event of a default by either Party to this Agreement, the Party not in default shall have the right to:

- a. Terminate this Agreement
- b. Exercise all other remedies available at law or in equity.

12. Dispute Resolution<sup>28</sup>. Any dispute arising out of or relating to this Agreement, including but not limited to the making of it or the alleged breach of it, including claims of fraud in the inducement, and any alleged violation of any right created by statute, shall be discussed between the disputing Parties in a good faith effort to arrive at a mutual settlement of any such controversy. If, notwithstanding, such dispute cannot be resolved, the Aggregator and Purchaser agree that such dispute shall be settled by binding arbitration. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The arbitrator shall be a retired state or federal judge or an attorney who has practiced business litigation for at least 10 years. If the Parties cannot agree on an arbitrator within 20 days, each party shall designate an arbitrator and such selected persons shall choose a third arbitrator with the required qualifications who shall arbitrate the dispute. Arbitration will be conducted pursuant to the provisions of this Agreement, and the commercial arbitration rules of the American Arbitration Association, unless such rules are inconsistent with the provisions of this Agreement. If one or both of the parties is a resident of a foreign jurisdiction, the parties may mutually agree in writing prior to arbitration commencement to have such arbitration conducted pursuant to the provisions of this Agreement and the commercial arbitration rules of the International Chamber of Commerce. Limited civil discovery shall be permitted for the production of documents and taking of depositions. Unresolved discovery disputes may be brought to the attention of the arbitrator who may dispose of such dispute. The arbitrator shall have the authority to award any remedy or relief that a court of this state could order or grant; provided, however, that punitive or exemplary damages shall not be awarded. The arbitrator may award to the prevailing Party, if any, as determined by the arbitrator, all of its costs and fees, including the arbitrator's fees, administrative fees, travel expenses, out-of-pocket expenses and reasonable attorneys' fees. Unless otherwise agreed by the Parties, the place of any arbitration proceedings shall be Dane County, Wisconsin.

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<sup>27</sup> This is a generic "Remedies" provision that does not address remedies tailored to specific defaults, such as failure to provide conforming deliveries. A placeholder for such provision is included in the body of the Biomass Procurement Agreement (See Agreement, Article III, Section 12).

<sup>28</sup> This is a sample dispute resolution provision that employs negotiation followed by binding arbitration. Particular circumstances may dictate a different approach.

13. Termination. The parties to this Agreement may terminate it under the following circumstances:
- a. By mutual written agreement.
  - b. Either party may terminate this Agreement if the other party breaches any material term of this Agreement and fails to cure such breach within the time period set forth under Section 10 of these General Conditions.
14. Insurance<sup>29</sup>. Aggregator agrees to keep in force at its own expense, during the entire period of the Services, the following insurance: **[Insert as applicable]**
- a. Commercial General Liability Insurance:
  - b. Workers Compensation Insurance:
  - c. Other Insurance:
- Producer agrees to indemnify and hold Purchaser harmless against any loss, damage or liability to third parties resulting from Producer's breach of its agreement to keep the required insurance in place.
15. Successors and Assigns. All provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, if any, successors, and assigns.
16. No Third Party Beneficiaries. This Agreement is not intended to and shall not create rights of any character in favor of any person other than the Parties to this Agreement or their permitted successors and assigns and the obligations assumed by the Parties to this Agreement are solely for the use and benefit of such Parties and their permitted successors and assigns.
17. Compliance with Laws. Aggregator and Purchaser agreed to comply with all applicable federal, state and local laws, including, without limitation all applicable statutes, regulations, and ordinances.
18. Choice of Law; Choice of Venue. The Agreement shall be governed by and construed in accordance with the laws of the State of Wisconsin.
19. Waiver. Waiver by one party hereto of breach of any provision of this Agreement by the other shall not operate or be construed as a continuing waiver.

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<sup>29</sup> The Parties should discuss with each other and with their respective insurance agents what types and amounts of insurance are appropriate given the insurable risks involved in performance of the Agreement. In addition to liability insurance that may indemnify Aggregator against claims for bodily injury and property damage, Producer may also want to carry (or require its Producers to carry) crop insurance to manage weather-related risks. If Purchaser is requiring Aggregator to carry insurance that it isn't currently carrying, the Parties should discuss responsibility for the costs of such insurance.



20. Modification or Amendment. No amendment, change or modification of this Agreement shall be valid unless in writing signed by the parties hereto.
21. Entire Understanding. This Agreement any exhibits or schedules attached constitute the entire understanding and agreement of the parties, and supersede any and all prior agreements, understandings, and representations.
22. Unenforceability of Provisions. If any provision of this Agreement, or any portion thereof, is held to be invalid and unenforceable, then the remainder of this Agreement shall nevertheless remain in full force and effect.
23. Counterparts. This Agreement may be executed in counterparts, each of which shall constitute an original and, taken together, constitute the entire instrument.